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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

NO. 624

MARRS McLEAN, Petitioner
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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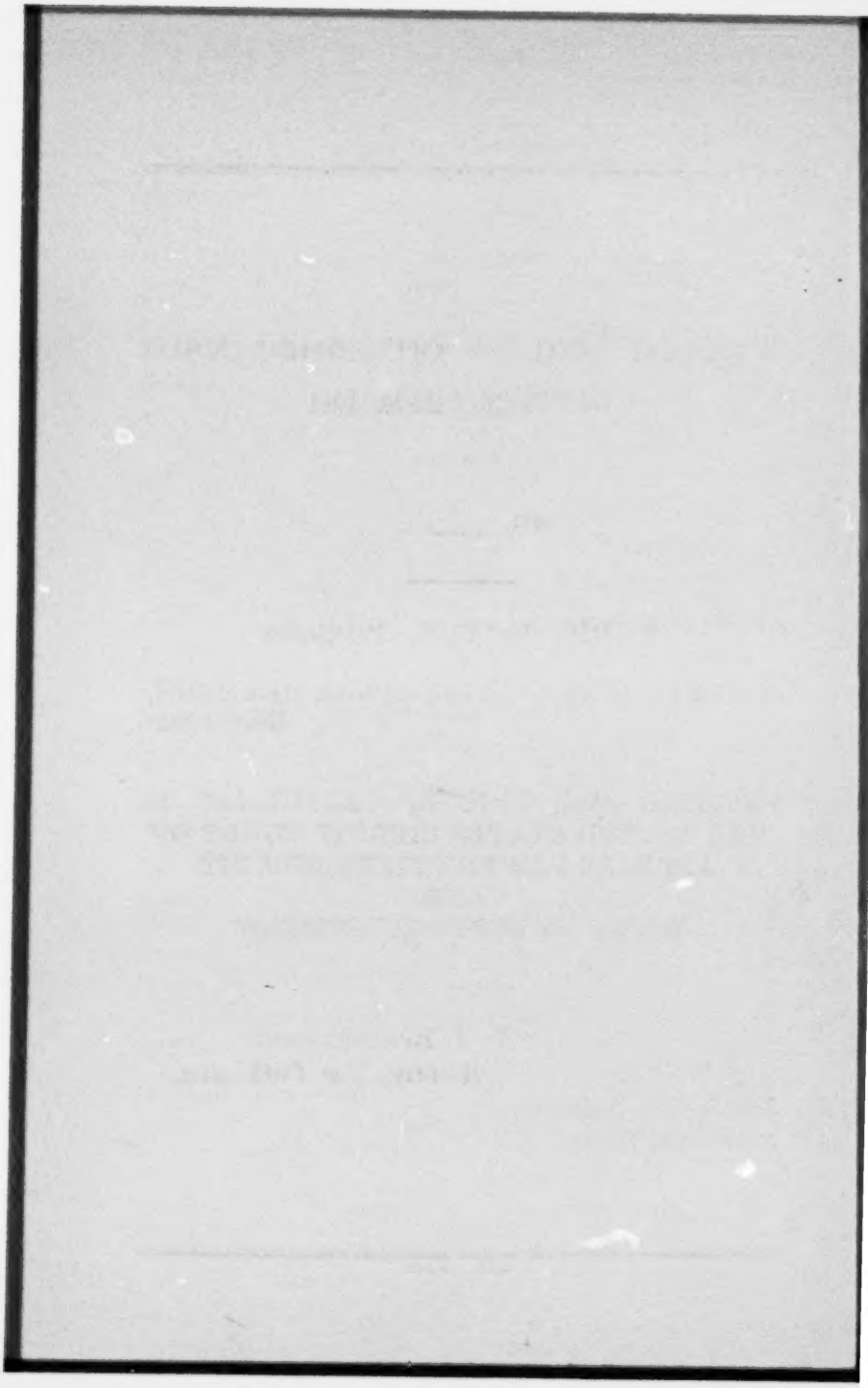

SUBJECT INDEX

	Page
Petition for Writ of Certiorari:	
A. Summary Statement of the Matter Involved	2- 8
1. Preliminary	2- 3
2. Questions Presented	3
3. Statement of the Case	3- 7
4. Specifications of Error to Be Urged	7- 8
B. Reasons for Granting the Writ	8-18
Conclusion	18
Brief in Support of Petition:	
I. Opinion Below	21
II. Jurisdiction	22
III. Statement of the Case	22
IV. Statutes Involved	23
V. Specifications of Error	23-24
VI. Argument	24-26
1. The Word "Sale" Should Be Given Its Ordinary Meaning	25-26
2. The Transaction Was Clearly a Sale	26-32
3. The Opinion Below Is an Erroneous Interpretation and Improper Application of the Decisions of This Court	32-36
Conclusion	36
Appendix A—Statutes Involved	37-39
Appendix B—G. C. M. 22730 (1941-26-10,755)	40-63

CITATIONS

	Page
Anderson v. Helvering, 310 U. S. 404	10, 12, 14, 15, 33, 35
Blankenship v. U. S., 95 F. (2d) 507	10
Bonwit-Teller & Co. v. U. S., 258, 263	12
Burnet v. Harmel, 287 U. S. 103	12, 25
Commissioner of Int. Rev. v. Fleming, 82 F. (2d) 324	15, 26

32552

Page

Commissioner of Int. Rev. v. Roeser & Pendleton, Inc., 118 F. (2d) 462 15

First Seattle Dexter Horton Nat'l Bank et al. v. Commr., 77 Fed. (2d) 45 ..... 16, 32
Five Per Cent Cases, 110 U. S. 471 26
Fowler v. U. S., 11 F. (2d) 895 25

Helvering v. Tex-Penn Oil Co. et al., 300 U. S. 48 17
Helvering v. Wm. Flaccus Oak Leather Co. (U. S. Sup. Ct. No. 627), Apr. 28, 1941 25
Helvering v. Elbe Land Development Co., 303 U. S. 372 ..... 10, 12, 13, 33
Herring v. Comm. Int. Rev., 293 U. S. 322 10

Jefferson Coal & Gas Company v. Commr., 52 F. (2d) 120 ..... 17, 32

Lynch v. Alsworth-Stephens Co., 267 U. S. 364, 369 26

Palmer v. Bender, 287 U. S. 551 ..... 12, 15, 33, 35

Spalding v. U. S. 97 Fed. (2d) 701 10

Thomas v. Perkins, 301 U. S. 655 ..... 11, 12, 13, 33

U. S. Phellis, 257 U. S. 156, 168 17

Williamson v. Berry, 8 Howard, 495, 543 26

STATUTES

Page

Rev. Act of 1928 ..... 2, 3, 6, 7, 8, 9, 13, 18, 23, 24, 32
Rev. Act of 1932 ..... 2, 3, 6, 7, 8, 9, 13, 18, 23, 24, 32
Rev. Act of 1934 ..... 2, 3, 6, 7, 8, 9, 13, 18, 23, 24, 32
Judicial Code, Sec. 240(a) (43 Stat. 938) 22
I. R. C., Sec. 117 ..... 2, 12
I. R. C., Sec. 105 2

TEXTS

Page

G. C. M. 22,730 (1941-26-10,755) 9, 25
1 Paul & Mertens, p. 22, Sec. 2.05 26

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Marrs McLean, an individual, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above cause on June 20, 1941, affirming a decision of the Board of Tax Appeals.

Your petitioner respectfully shows:

A.

Summary Statement of the Matter Involved.

1. Preliminary.

In 1931 petitioner transferred and assigned to Yount-Lee Oil Company certain oil leases, the leasehold estates created thereby, and the physical properties and equipment thereon, less and except a royalty of twenty-five per centum of the oil produced and saved therefrom, out of which all outstanding royalties were to be paid, including that due the lessors, for a consideration of Five Hundred Thousand Dollars cash, and Two Million Dollars to be paid out of one-eighth of the gross oil to be produced.

In filing his income tax returns for the years 1931 to 1935, inclusive, the taxpayer reported the cash payment and the amounts collected on the Two Million Dollar payment, as capital gains as provided for in Sections 101 of the Revenue Acts of 1928 and 1932, and Section 117 of the Revenue Act of 1934[1]. (R. 223.)

Respondent determined that the reservation and exception of a royalty in excess of that reserved by the lessors, and out of which petitioner assumed to pay all outstanding royalties, *prevented* the transaction from being a sale, either within the purview of the capital gains provisions of the Revenue Acts of 1928, 1932 and 1934, or "Prospectors' Relief" provision (Section 102)[2] of the Revenue Acts of

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1I. R. C., Sec. 117.

2I. R. C., Sec. 105.

1928 and 1932. Based on that premise he determined that both the cash and the payments received on account of the Two Million Dollars constituted ordinary income, and are taxable as such. Deficiencies resulted. The Board of Tax Appeals sustained the determination, and the court below affirmed the Board.

2. Questions Presented.

The principal questions are:

(1) Whether or not the transaction constituted a sale within the meaning of the capital gains provisions of the Revenue Acts of 1928, 1932 and 1934.

(2) Whether or not the transaction constituted a sale within the meaning of Sections 102 of the Revenue Acts of 1928 and 1932.

3. Statement of the Case.

In 1919 the petitioner leased from Cade and others, lands situated at High Island in Galveston County, Texas, for the exploration and development of oil, gas and other minerals. A royalty of twelve and one-half per centum of the oil produced and saved upon the lands was reserved to the owners.

Before March 18, 1931, petitioner succeeded in discovering oil in commercial quantities upon the leased premises. (R. 215.) On that date he entered into a written agreement with the Yount-Lee Oil Company. (R. 271-277.) Under the terms thereof, for a consideration of Five Hundred Thousand Dollars cash and "Two Million Dollars to be paid

out of one-eighth of the gross oil produced and saved from the lands * * * if, as and when produced and saved, and only in that event," he "granted, sold, conveyed, transferred and assigned" to that company the "leases * * * leasehold estates created thereby" and "all physical properties and equipment thereon," less and except a "royalty of twenty-five per centum of the oil produced and saved," out of which all outstanding royalties, including that due the lessors, were to be paid.

The transfer of seventy-five per cent of the oil included one hundred per cent of the ownership and control of the working or operating interest. There were no restrictions or limitations as to use, no obligations with respect to development and producing operations, and no provision for reversion. (R. 271-277.)

On the date of the above transaction McLean was the owner of the leases, and in addition, owned a one-fifth of the one-eighth royalty reserved by the original lessors. (R. 217.)

The Yount-Lee Oil Company drilled numerous wells upon the leases, which produced and, at the commencement of these proceedings were producing, large quantities of oil. (R. 217.)

The division orders on which the oil was run to and paid for by the pipe line companies from April, 1931, until July, 1935 (on which date the Yount-Lee Oil Company transferred the leases to the Stanolind Company) were based on seventy-five per centum to the Yount-Lee Company, fifteen per centum to McLean, and ten per centum to the

lessors. (R. 348.) The Yount-Lee Company settled with McLean monthly, paying him fifteen per cent on the royalty account, and twelve and one-half per cent on the oil payment account. (R. 348.)

After Stanolind's purchase the division orders were based on sixty-two and one-half per cent to Stanolind, and twenty-seven and one-half per cent to McLean—twelve and one-half per cent on the the oil payment account and fifteen per cent on the royalty account. (R. 348.) Settlements were made by that company monthly on this basis. (R. 222.)

Between March 18, 1931, and December 31, 1935, McLean received the following amounts on account of said Two Million Dollar payment (R. 216):

Year.	*Amount.*
1931	$ 7,144.09
1932	109,363.36
1933	127,323.22
1934	189,917.34
1935	105,075.56

The Yount-Lee Oil Company capitalized the cash and the amounts paid to McLean on account of the Two Million Dollar payment, and charged the same on its books to the cost of the leases. (R. 221, 306-312.)

McLean considered the transaction as constituting a sale of capital assets, and in his income tax returns for the years 1931 to 1935, inclusive, reported the cash payment and the amounts collected on the Two Million Dollar payment as capital gains, taxable as provided in Sections 101 of the Revenue

Acts of 1928 and 1932, and Section 117 of the Revenue Acts of 1934. (R. 223.)

Respondent conceded (R. 216), and the Board of Tax Appeals found (R. 182) that McLean did not hold the leases primarily for sale in course of his business (R. 216); and that the leases did not represent stock in trade or other property of a kind which would be included in the inventory if on hand at the close of the taxable year. (R. 182, 216.)

Respondent determined that neither the cash nor the amounts received on account of the Two Million Dollar payment represented *gains* from the *sale* of capital assets, but constituted ordinary income, subject to both normal and surtaxes under Sections 11 and 12 of the Revenue Acts of 1928 and corresponding provisions of the Revenue Acts of 1932 and 1934 (R. 223, 224); and allowed depletion on such payments at the rate of twenty-seven and one-half per centum. (R. 224.)

Respondent further conceded (R. 215), and the Board of Tax Appeals found (R. 182) that the principal value of the leases was demonstrated by prospecting and exploration work done by McLean (R. 215), but further determined that McLean was not entitled to the benefit of Section 102 of the Revenue Acts of 1928 and 1932. (R. 192, 193.)

Based on such determinations and other adjustments immaterial here, respondent determined deficiencies in petitioner's income taxes as follows (R. 205):

Year.	*Amount.*
1931	$10,944.82
1932	45,436.64
1933	20,356.44
1934	37,174.05
1935	18,638.66

The Board of Tax Appeals sustained respondent's determination and the court below affirmed the Board.

4. Specifications of Error to Be Urged.

1. The court below erred in holding that the transaction which the petitioner entered into with the Yount-Lee Oil Company on March 18, 1931, did not constitute a sale within the purview of the Capital Gains Provisions of the Revenue Act of 1928.

2. The court below erred in holding that the transaction which the petitioner entered into with the Yount-Lee Oil Company on March 18, 1931, did not constitute a sale within the purview of the Capital Gains Provisions of the Revenue Act of 1932.

3. The court below erred in holding that the transaction which the petitioner entered into with the Yount-Lee Oil Company on March 18, 1931, did not constitute a sale within the purview of the Capital Gains Provisions of the Revenue Act of 1934.

4. The court below erred in not holding that the cash consideration received by petitioner upon the transfer and assignment of the Cade leases to the Yount-Lee Oil Company on March 18, 1931, constituted gains derived from the sale of capital assets

within the purview of the Capital Gains Provisions of the Revenue Acts of 1928 and 1932.

5. The court below erred in not holding that the amounts received by petitioner during 1931, 1932, 1933, 1934 and 1935 on account of the Two Million Dollar payment, constituted gains derived from the sale of capital assets within the purview of the Revenue Acts of 1928, 1932 and 1934.

6. The court below erred in holding that the transaction which the petitioner entered into with the Yount-Lee Oil Company on March 18, 1931, did not constitute a "bona fide sale" within the purview of Section 102 of the Revenue Acts of 1928 and 1932.

7. The court below erred in not holding that the petitioner was entitled to the benefit of Section 102 of the Revenue Acts of 1928 and 1932, with respect to the amounts which petitioner received during the years 1931 to 1933, inclusive, on account of the transfer of the Cade leases to the Yount-Lee Oil Company on March 18, 1931.

B.

Reasons for Granting the Writ.

(1) Oil and gas transactions involve many undecided questions with respect to their status for the purpose of Federal income taxation. This circumstance has been recognized by the Bureau of Internal Revenue of the Treasury Department, and probably prompted it, in June, 1941, to promulgate a memorandum of its views in regard to such trans-

actions. G.C.M. 22,730 (1941-26-10, 755), Appendix B, pp. 40 *et seq.*

In holding that petitioner's reservation and exception of a royalty in excess of that reserved by the lessors, prevented the transaction from being a *sale* within the meaning of that word as used in the Revenue Acts of 1928, 1932 and 1934, the Circuit Court of Appeals decided one of the most important of such questions which have not been directly passed upon but which should and must ultimately be decided by this court.

The Internal Revenue Bureau unmistakeably recognizes that proceeds derived upon the transfer of an economic interest in oil and gas properties may constitute gains within the purview of the Capital Gains Provisions of the Revenue Acts. In the above memorandum Chief Counsel for the Bureau took occasion to point out that,

> "A cash payment representing proceeds from the sale of an economic interest also accomplishes a substitution of payor invested capital for payee invested capital. The payee in such a case realizes capital gain or loss, measured by the difference between cost allocable to the interest sold and proceeds received." (See Appendix B, pp. 40 *et seq.*)

A fortiori, such a transfer may constitute a sale within the meaning of Section 102 of the Revenue Acts of 1928 and 1932.

Prior to his transaction with the Yount-Lee Oil Company on March 18, 1931, the petitioner owned ninety per cent of the oil in the Cade leases. That

interest carried with it the rights and burdens of extraction of the mineral. By the express terms of that transaction he unconditionally transferred to the Young-Lee Oil Company seventy-five per cent of the entire oil interest in the properties, together with the rights and burdens of the development and production—being one hundred per cent ownership and control of the working or operating interest in the leases—*but without obligation with respect thereto, or limitation or reversion on default thereof,* for the sum of Five Hundred Thousand Dollars cash, and that company's promise to pay him Two Million Dollars out of one-eighth of the gross oil produced and saved from the leased premises, "if, as and when produced," translated into cash according to a formula set out in their agreement.

This was not a leasing transaction in which the transferor receives a payment in advance for oil and gas to be extracted in the future, *Herring v. Commissioner of Internal Revenue,* 293 U. S. 322, 324, and which serves merely to diminish his investment but not reduce his economic interest in the oil in place, as does the production of the mineral. The cash which petitioner received, as well as the cash which he was conditionally promised, was paid and promised in return for seventy-five per cent of the economic interest in the oil with which he parted. *Anderson v. Helvering,* 310 U. S. 404 at 409; *Helvering v. Elbe Oil Land Development Co.,* 303 U. S. 372; *Blankenship v. U. S.* 95 F. (2d) 507; *Spalding v. U. S.,* 97 F. (2d) 701.

In effect the transaction accomplished that which

Chief Counsel for the Bureau of Internal Revenue characterizes a "substitution of payor invested capital for payee invested capital" in the properties. In the instant case the petitioner, as the payee, derived gain, measured by the difference between the cost of his interest and the proceeds received.

This Court has held that the transfer of an interest in oil leases was no less a sale because the transferor withheld from the operation of the grant a specified portion of the oil to be produced and saved, up to an amount sufficient when sold to yield a specified sum of money. *Thomas v. Perkins,* 301 U. S. 655. By the same token, petitioner's reservation and exception from his transfer of a portion of the economic interest owned on the date of the transaction in no way prevented his transaction from being an absolute sale of that portion of the interest which he gave up, and which the Yount-Lee Oil Company in turn acquired and owned as a result thereof, and over which it exercised unlimited power and control.

The decision of the court below that petitioner's retention of a portion of the interest originally owned prevented the transaction from constituting a sale, is equivalent to holding that owners of a leasehold estate in oil and gas, which carries with it the right and burden of extraction of the mineral, but without obligation with respect thereto, cannot effect a sale of a *portion* of such interest; that, irrespective of the intention of the parties at the time of the transaction, and the construction they thereafter place upon it, the retention of an economic interest

in the oil for the duration of the lease converts into a leasing transaction that which would otherwise constitute a sale.

There is nothing in the opinions of this Court in *Palmer v. Bender*, 287 U. S. 551, or *Burnet v. Harmel*, 287 U. S. 103, from which such conclusion can be drawn. Both cases arose out of factual situations and presented questions readily distinguishable from the instant case. Such conclusion conflicts with the reasoning of this Court in *Thomas v. Perkins, supra; Helvering v. Elbe Oil Land Development Co., supra*, and *Anderson v. Helvering, supra*. Moreover, such a "rule" clearly denies to owners of such interest not only the benefit of the capital gains provisions of the Revenue Acts, which other taxpayers enjoy without such restrictions, but in addition, in disregard of established principles of income taxation, announced by this Court in *Bonwit-Teller & Co. v. U. S.*, 283 U. S. 258, 263, puts beyond reach of the discoverer of oil the relief which Congress by Sections 102 of the Revenue Acts of 1928 and 1932[3], clearly intended he should receive as a reward for his unrelenting efforts and risk of capital.

These matters are clearly of such public importance that there should be an authoritative decision of this Court on the questions they present.

(2) The holding of the court below that this Court held in *Palmer v. Bender*, 287 U. S. 551, that the exception and reservation of an economic interest in a transaction such as petitioner made with Yount-Lee Oil Company, prevented the same from

[3] I. R. C., Sec. 117.

being a "sale" within the purview of the Capital Gains Provisions of the Revenue Acts of 1928, 1932 and 1934, and Section 102 of the Revenue Acts of 1928 and 1932, is an improper interpretation and misapplication of the decision in that case, deserving review and correction by this Court. This Court did not there decide that the exception or reservation of an economic interest in the oil was a deciding factor in determining whether or not such a transaction constituted a "sale" or sublease. That case involved the right of the transferor of certain oil leases to deductions for discovery depletion upon cash and oil payments received, and royalty reserved under the terms of two oil lease transactions. The Government rested its denial of the deductions upon the premise that the transactions were sales or assignments. The taxpayer contended that they were subleases, and that the cash received was an advance payment on account of royalty to be paid on oil to be produced. The decision sustained the taxpayer.

In one of the transactions (the Smitherman Partnership to the Ohio Oil Company), the assignee paid the partnership, on execution of the instrument by which the transaction was memorialized, cash in the amount of Three Million Dollars; agreed to pay One Million Dollars out of oil, and further covenanted to perform the terms and covenants of the lease (which ordinarily include provisions with respect to the exploitation, development and operation of the properties), and "to pay over and deliver unto assignors * * * the equal one-eighth of all oil

produced and saved from * * * the premises as an excess royalty, whether produced under the * * * lease contract or under any extension, renewal or other contractual obligation entered into * * * with the lessors, his heirs or assigns."

These provisions closely resembled the terms of conventional oil and gas leases; created a relationship between the parties comparable to that between lessor and lessee, and marked the transaction as a sublease as urged by the taxpayer. Accordingly, this Court held that, "the bonus received by the Smitherman Partnership was a return *pro tanto* of petitioner's capital investment in the oil, an anticipation of its extraction, resulting in a corresponding diminution of the unit depletion allowance upon the royalty oil as produced."

This Court did not hold that the payment of a cash consideration for the transfer of an oil lease in which assignor excepted or reserved a royalty—as a matter of law—prevented the transaction from constituting a sale within the meaning of the Capital Gains Provisions of the Revenue Acts.

Cash payments are regarded as advance royalties only in leasing transactions (*Anderson v. Commissioner of Int. Rev.*, 310 U. S. 404, 409); never in sales. (*Thomas v. Perkins*, 301 U. S. 655; *Helvering v. Elbe Oil Land Development Co.*, 303 U. S. 372.) Whether the transaction falls within the category of the one or the other must be determined from the substance of the transaction, not from the form of the economic interest excepted or the oil payments stipulated. These are looked to for deter-

mining "who has a capital investment in the oil and gas in place, and what is the extent of his interest." *Anderson v. Helvering, supra,* at 407.

In the instant case the assignee was free of any obligation to perform the terms and covenants of the lease, and expressly relieved of any obligation to drill upon or develop the land or any part thereof. Nor was there any stipulation in the agreement that the assignee should pay McLean, as excess royalty, a specified share of the oil to be produced, whether produced under the leases transferred or any extension, renewal or other contractual obligations between the assignee and the landowners. Instead, petitioner excepted and reserved from his grant a "royalty of twenty-five per cent of the oil produced and saved * * * out of which * * * all outstanding royalties (including royalties due lessors under the terms of said lease) and all overriding royalties were to be paid."

The opinion of the court below clearly manifests its misinterpretation of the decisions of this Court in *Palmer v. Bender, supra,* and the other cases above cited. That interpretation has led it into conflict not only with the decisions of this Court in these cases but with its own decisions in *Commissioner of Internal Revenue v. Fleming,* 82 F. (2d) 324; and *Commissioner of Internal Revenue v. Roeser & Pendleton, Inc.,* 118 F. (2d) 462.

(3) When the transaction between petitioner and the Yount-Lee Company is tested by the uniform rules of decision of all the courts, state and federal, and by the pronouncements of all the text authori-

ties defining the constituent elements of a sale, as contradistinguished from any other type of transfer, the fact that it was a sale by petitioner of a specified economic interest in oil and gas properties is apparent. Nevertheless, the court below, after correctly detailing the facts constituting the sales transaction, and the construction placed upon their contract by the parties to it, as evidenced by their acts in carrying out its express and unambiguous terms, in summation said, "There was no sale here."

The conclusion thus stated is a *non sequitur*, and is in direct conflict with fundamental principles consistently applied in the administration of the income tax laws. As said by the Circuit Court of Appeals for the Ninth Circuit in *First Seattle Dexter Horton Nat'l Bank et al. v. Comm'r*, 77 Fed. (2d) 45, at pages 47-48:

> "In passing upon the question of whether or not the contract is severable or entire, it is fundamental that the intention of the parties should be looked to, and that the contract should be construed so as to effectuate such intention so far as the bounds of reason and justice permit. Obviously, courts cannot possibly know or judge what the parties may have intended to accomplish but failed to expressly provide for, and therefore such intention must be ascertained by a fair construction of the terms of the contract itself. So where parties enter into a written agreement which embodies and sets forth in full all the terms and conditions of the contract, their intentions must necessarily be determined from and governed by the language they have employed in such writing, and from the subject-matter of the agreement. To do otherwise would

be to frustrate the very end for which people contract in writing."

The Circuit Court of Appeals for the Third Circuit stated and applied the rule in *Jefferson Coal and Gas Company v. Comm'r,* 52 F. (2d) 120, at page 122:

> "* * * the real character of an instrument must be determined from the intention of the parties as gathered from a fair interpretation of the instrument as a whole (citing authorities). Looking at the instrument as a whole, and the object sought to be obtained, that it is a contract of sale of coal in place and not a lease is inescapable."

And this Court has affirmed and reaffirmed the doctrine that transactions must be examined as to their substance:

> "We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the 16th Amendment and income tax laws enacted thereunder. In a number of cases besides those just cited we have, under varying conditions, followed the rule." (Citing previous decisions.) *United States of America v. Phellis,* 257 U. S. 156, 168.
>
> "* * * the rule is well settled that in determining tax liability, taxing authorities must look through form to fact and substance." *Helvering v. Tex-Penn Oil Co. et al.,* 300 U. S. 481, at 492.

Thus predicated upon an unauthorized and arbitrary conclusion, in conflict with such established principles, and in disregard of the substance of the

transaction, the court below denied petitioner the benefit of Sections 101 and 102 of the Revenue Acts of 1928 and 1932, and Section 117 of the Revenue Act of 1934, which the Congress clearly intended the vendor of capital assets should receive, and deprived petitioner of the express relief which the Congress intended that discoverers of oil should be accorded upon realization of success after years of fruitless prospecting and exploration; and, in addition, penalized petitioner with a large deficiency imposed by the respondent.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court a full and complete Transcript of the Record and all the proceedings in this case, being number 9870 in said Circuit Court of Appeals, to the end that said cause may be reviewed and determined by this Court, and that your petitioner have such other and further relief as to this Court may seem appropriate and in conformity with law.

MARRS MCLEAN,
Petitioner,
By L. J. BENCKENSTEIN,
His Attorney.

Dated at:
Beaumont, Texas,
September 10, 1941.